No. 05-696

In The

Supreme Court of the United States

JAMES RAY CREED,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can a Michigan state court enhance the sentence of a criminal defendant beyond that mandated by statutory guidelines based on facts not found by a jury beyond a reasonable doubt?

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CITATION OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS

There are two orders entered by courts relevant to this petition. The Michigan Court of Appeals issued an order on February 23, 2005 that has not been published but has been reproduced in the appendix to this petition. (App. 1.) The Michigan Supreme Court issued an order on August 30, 2005 that is published as *People v. Creed*, 474 Mich. 856; 702 N.W.2d 579 (2005) and that has also been reproduced in the appendix to this petition. (App. 30.)

BASIS FOR JURISDICTION

Petitioner seeks review of the February 23, 2005 opinion of the Michigan Court of Appeals denying Petitioner leave to appeal his sentencing in light of this Court's decision in *Blakely v. Washington*, 542 U.S. 466; 120 S. Ct. 2348; 147 L. Ed. 2d 435 (2000). On August 30, 2005, the Michigan Supreme Court denied Petitioner leave to appeal the Michigan Court of Appeals' decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

STATEMENT OF THE CASE

The facts in the instant case largely mirror those in *Blakely*. Petitioner pled guilty to assault with intent to commit sexual penetration on November 10, 2003, in the Osceola County Circuit Court. (App. 26.) The plea bargain provided for dismissal of an additional count of kidnapping, and that the sentencing guidelines would not be scored for the kidnapping count. (App. 16-23.) During the plea hearing, Petitioner admitted that he grabbed the complainant around the neck, pulled out a weapon and tried to force her to have sexual intercourse with him. (App. 24-26.)

The trial court scored statutory sentencing guidelines for touching with a knife (Offense Variable 1), the fact of a knife (Offense Variable 2), severe psychological injury (Offense Variable 4), movement of the victim (Offense Variable 8), multiple victims (Offense Variable 9) and predatory conduct (Offense Variable 10). (App. 28-29.) The facts the court applied to Offense Variables 4, 8, 9 and 10, however, were never determined by a jury beyond a reasonable doubt. Rather, they were based on judicial fact-finding. Defense counsel objected to the scoring of Offense Variables 4, 8 and 9 at the time of sentencing but the trial court overruled these objections. (App. 3-8.)

The inclusion of these Offense Variable increased the guidelines range for Petitioner's sentence from 0 to 11 months, *see* Mich. Comp. Laws Ann. § 777.65 (West. 2005)

(Class I [illegible]d), to 10 to 23 months. (App. 29.) On January 21, 2004, the Honorable Lawrence C. Root sentenced Petitioner to a term of 23 months to ten years imprisonment.

Petitioner appealed his sentence to the Michigan Court of Appeals. Petitioner argued that the trial court's scoring of Offense Variables 4, 8 and 9 based on facts not found by a jury beyond a reasonable doubt violated his Sixth Amendment right to trial by jury as held by this Court in *Blakely*. On February 23, 2005, the Court of Appeals denied Petitioner leave to appeal "for lack of merit in the grounds presented." (App. 1.) Presumably, the Michigan Court of Appeals based its determination on the Michigan Supreme Court's statement *People v. Claypool*, 470 Mich. 715; 684 N.W.2d 278 (2004), that *Blakely* does not apply to Michigan's sentencing guidelines. *See, e.g., People v. Drohan*, 264 Mich. App. 77, 89 n.4; 689 N.W.2d 750 (2004) (rejecting appellant's *Blakely* argument based on *Claypool*), *lv. granted*, 472 Mich. 881; 693 N.W.2d 823 (2005).

Petitioner thereafter appealed his sentence to the Michigan Supreme Court based on the same *Blakely* argument that he raised before the Michigan Court of Appeals. On August 30, 2005, the Michigan Supreme Court denied Petitioner's application for leave to appeal because it was "not persuaded that the questions presented should be reviewed by th[e] Court." (App. 30.)

REASONS FOR GRANTING THE WRIT

This case presents an issue that this Court failed to expressly decide in its opinion in *Blakely*. Other than for purely "determinate" or "indeterminate" sentencing schemes,

under what circumstances does a defendant's Sixth Amendment right to trial by jury apply to sentencing?

Michigan's sentencing guidelines are neither truly determinate nor indeterminate. In *Claypool*, however, the Michigan Supreme Court held that Michigan's sentencing guidelines are "indeterminate" and therefore "unaffected" by *Blakely*. *Claypool*, 470 Mich. at 730 n.14. The court characterized Michigan's sentencing guidelines as "indeterminate" because trial judges determine a minimum sentence range for defendants, but do not determine the maximum sentence for defendants (the maximum sentence is set by statute except in the case of habitual defenders). *Id.*

The Michigan Supreme Court's analysis and conclusion in *Claypool*, however, conflict with this Court's decision in *Blakely* in several respects. The *Blakely* court recognized that the Sixth Amendment is implicated whenever a judge exceeds the statutory maximum that the judge could impose based on facts found by the jury. *Blakely*, 542 U.S. at 303. "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303-04 (emphasis in original).

Although under the Michigan guidelines a defendant's maximum sentence is generally set by statute, a defendant's minimum sentencing range is determined by the court. Notably, the upper end of this minimum range (the "maximum minimum") still constrains the sentence that the court may impose, and a judge cannot exceed this maximum without additional fact-finding. *People v. Babcock*, 469 Mich. 247, 259; 666 N.W.2d 231 (2003). Thus,

Michigan's maximum minimum is a statutory maximum within the meaning of *Blakely*, and the imposition of a sentence exceeding the maximum minimum is subject to *Blakely*.[1]

Michigan's guidelines also include certain determinate intermediate sanctions that permit no more than a jail sentence of a limited length. Mich. Comp. Laws Ann. § 769.34(4). Such jail sentences are determinate within the meaning of *Blakely*, *People v. Martin*, 257 Mich. App. 457; 668 N.W.2d 397 (2003), and are therefore statutory maximums from which a sentencing court can depart only for substantial and compelling reasons. Mich. Comp. Laws Ann. § 769.34(4). Therefore, Michigan's intermediate sanctions are governed by *Blakely*.

The Michigan Supreme Court's determination that Michigan's sentencing guidelines are not subject to *Blakely* is also inconsistent with the Michigan legislature's intent in enacting the sentencing guidelines. *Blakely* is inapplicable to indeterminate sentencing schemes that are intended to provide unfettered judicial discretion in sentencing. *Blakely*, 542 U.S. at 305. Michigan's guidelines by contrast were specifically enacted to constrain and limit judicial discretion and replaced a prior indeterminate system. *People v. Garza*, 469 Mich. 431, 434-35; 670 N.W.2d 662 (2003); *People v. Hegwood*, 465 Mich. 432, 438-39; 636

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[1] As observed by this Court in *Apprendi v. New Jersey*, 530 U.S. 466; 120 S. Ct. 2348; 147 L. Ed. 2d 435 (2000), "[t]he relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494. A Michigan court's departure from a maximum minimum undoubtedly exposes a defendant to greater punishment than would be permissible based on the jury verdict alone.

N.W.2d 127 (2001). The Michigan Supreme Court – in holding that *Blakely* is inapplicable to Michigan's sentencing guidelines – has undermined this legislative intent and is, in fact, the very type of judicial decision that caused the Framers [to] put a jury-trial guarantee in the Constitution." *Blakely*, 542 U.S. at 308.

The decision of the Michigan Supreme Court in *Claypool* therefore conflicts with this Court's interpretation of the Sixth Amendment right to jury trial as described in *Blakely*. This conflict justifies the exercise of this Court's jurisdiction.

Indeed, the summary treatment of this issue by the Michigan Supreme Court illustrates the necessity of granting *certiorari*. Only via the intervention of this Court will defendants such as Petitioner be able to protect their Sixth Amendment right to jury trial in the sentencing process. Without intervention, Petitioner and other defendants will be denied this constitutional right which is not simply a "procedural formality, but a fundamental reservation of power in our constitutional structure." *Id.* at 306.

Certiorari is also appropriate because this Court's review of this case will provide further guidance to other jurisdictions attempting to apply *Blakely* to their own sentencing schemes. As recognized by the dissent in *Blakely*, any number of jurisdictions employ sentencing guidelines of various forms, *Blakely*, 542 U.S. at 323 (O'Connor, J., dissenting), and each would benefit from a further elaboration by this Court of the circumstances under which *Blakely* applies to a sentencing system.

Finally, *certiorari* would also prove beneficial because Petitioner's case is an excellent vehicle for examining these issues. As discussed above, Petitioner's case presents

an almost identical fact scenario as *Blakely*. Moreover, Petitioner's case does not simply raise the question of maximum minimums, but also involves a crime that would have resulted in a determinate intermediate sanction but for additional judicial fact finding.

Petitioner's case raises an important Sixth Amendment issue that this Court first addressed in *Blakely* and that merits further review given its treatment by the Michigan Supreme Court. Therefore, this Court should grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Court of Appeals, State of Michigan

ORDER

People of MI v. James Ray Creed		David H. Sawyer Presiding Judge
Docket No.	260235	Jane E. Markey
LC No.	03-003570-FC	Michael R. Smolenski Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

/s/ [Signature]
Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk on,

[SEAL] Feb 23 2005 /s/ Sandra Schultz Mengel
Date Chief Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OSCEOLA

PEOPLE OF THE STATE OF MICHIGAN — File No: 03-3570-FC

-vs-

JAMES RAY CREED,

Defendant /

SENTENCE

BEFORE THE HONORABLE
LAWRENCE C. ROOT, CIRCUIT JUDGE

Reed City, Michigan – Wednesday, January 21, 2004

APPEARANCES:

SANDRA D. MARVIN Prosecuting Attorney
On behalf of the People

KIMBERLY L. BOOHER
On behalf of the Defendant

* * *

[4] MS. MARVIN: No, your Honor.

THE COURT: Ms. Booher, have you and your client had an opportunity to examine the report?

MS. BOOHER: We have, your Honor.

THE COURT: Are there any unresolved challenges?

MS. BOOHER: There are, your Honor.

One that I did not bring to the Court's attention is actually the jail credit. I have just looked on the jail slip, and I believe the jail has 188 days jail credit. The sentence date on the report was the 5th, and so I believe that's the difference in the jail credit at this time.

THE COURT: Those changes are made.

Has the State examined the report?

MS. MARVIN: Yes, your Honor. I have no challenges.

THE COURT: Ms. Booher, do you wish to make any comment on your client's behalf?

MS. BOOHER: Your Honor, I had additional challenges to the OVs.

THE COURT: Oh. I'm sorry. Go ahead.

MS. BOOHER: Your Honor, I would challenge the scoring in OV 4.

Your Honor, my client has been scored for ten points for serious psychological injury to the victim [5] requiring professional treatment.

Your Honor, based on the information that was provided to me, there is not any indication that there has been serious psychological injury. Therefore, we would request that those ten points be taken off from the scoring.

THE COURT: The State's response.

MS. MARVIN: Your Honor, the victim in this case has indicated that she is scared of everybody, that she's scared to go anywhere by herself, she doesn't like the dark, I hate strangers. She is still suffering from nightmares. And

she was attending counseling at the County Mental Health, I believe in Newaygo County. That information was indicated by the victim in her victim impact statement, which has been shared with Ms. Booher this morning. We would ask that those points stand.

THE COURT: Ms. Booher, first of all, do you acknowledge receiving that statement, although it was not attached to the pre-sentence report?

MS. BOOHER: Your Honor, I was shown it this morning, yes.

THE COURT: Rebuttal on the objection?

MS. BOOHER: Your Honor, we would just ask that those points be removed.

THE COURT: The victim impact statement portion of [6] the report hints at the harm indicated. The full victim impact statement, which I will require to be filed or at least attached to the pre-sentence report, I believe amply satisfies the background information for the scoring of OV 4. The objection is overruled, but noted.

MS. BOOHER: Thank you, your Honor.

Your Honor, I would also object to the 15 points that have been scored in OV 8; that is, the victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.

I would indicate that in this case, actually what – what occurred was that based on the testimony from the victim at the preliminary examination, when specifically asked how far she was taken, I believe she said 15 or 20

feet. I believe that that was part of the assault charge and that it should not – and that that was necessary to commit the offense. Therefore, I do not believe that the additional 15 points for asporting her to another place of greater danger or a situation of greater danger exists in this case. I think what occurred, the stepping of 15 to 20 feet was part of the assault charge, and I don't believe that those points should be scored in this case.

THE COURT: The State's response.

[7] MS. MARVIN: Your Honor, the assault that took place took place on a trail that was frequently used by campers that were on one side of the road to get back and forth to the lake on the other side of the road. That's where the assault occurred. He asported the victim from that trail, that 15 to 20 feet, in the woods. And I believe that was to a situ – or to a place of greater danger, because she was taken off from the trail into the woods. And I believe that those points should also stand.

THE COURT: Rebuttal?

MS. BOOHER: Your Honor, I don't believe that she was placed in any greater danger than the assault. And, as a matter of fact, when she screamed, my client ran, got scared and ran. So I don't believe that she was placed in any greater danger.

THE COURT: I'm going to overrule the objection. The defendant accosted the victim with a knife on a wooded trail, on a trail through the woods, and I understand was moved 15 to 20 feet off the trail. I believe that is a sufficient asportation under the evaluation required under this offense variable. It appears that the purpose for taking her into the woods would be so that the sexual

assault could be perpetrated. To me, it's a classic asportation situation. The scoring stands.

MS. BOOHER: Your Honor, the last objection that I [8] would have to the scoring would be to OV 9, the number of victims. There have – the probation department has given my client ten points for two to nine victims.

The instructions in that – in that OV indicate that to count each person that was placed in danger of injury or loss of life as a victim. I believe under the circumstances, there were two other children with the girl that was involved in this situation. However, they were behind. As a matter of fact, there was a number of times, when the victim testified in this case, that she should – that she had to call for them to come – to come closer. They weren't. They were dawdling on the pathway behind them. I do not believe under the instructions that they were placed in any danger of any injury or any loss of life. Therefore, I do not believe that these two should be scored as victims. And we would ask that the points, the 15 – or the ten points on that OV be removed.

THE COURT: Response?

MS. MARVIN: Your Honor, the other two victims in this case were 5 and less than 4 years of age. The defendant, while holding a knife to the victim's throat, required her to keep yelling at those children to make them keep up. They were a part of this situation. They were not near witnesses. They were not allowed to leave. They suffered psychological injury by watching the victim be [9] grabbed like she was, the knife held to her throat. And they have suffered the psychological injury, which I believe is enough under OV 9. And I would ask that the points stand.

THE COURT: Rebuttal?

MS. BOOHER: Your Honor, we would just indicate that I don't believe that they were in any danger of injury.

THE COURT: Give me a moment.

Looking at the pre-sentence report, which is the only information I have so I'm not sure what other information there is, it does indicate that – and it refers to the police report – the defendant instructed the victim – and I'm talking here principal victim – to go with him and to bring, in quotes I'll put in here it, your kids. The victim asked the children be allowed to leave, but the defendant ordered her to bring them with her. The report indicates that the defendant told the principal victim to tell the little girl to get up with them or he's going to slice her, the victim's, throat.

Under those circumstances where the defendant is accosting this 15-year-old victim, who was caring for two younger children and, in accosting her, directed her to have the younger children come with him as they go into a place of greater danger, as I've characterized it under the [10] asportation analysis that was done earlier, brings those two younger children within the definition of victim within the analysis under OV 9.

And I will note that the rule under its instructions doesn't – that the guidelines, I should say, under the instructions don't specify whether the injury is physical injury or could be emotional or mental injury. It's the risk, not necessarily the certainty of it. And I believe under these circumstances, the scoring is appropriate.

Further, I'll note that even if the injury is considered to be that physical injury is required, we're at 65 points. 55, in other words take off 10, wouldn't change the OV level. So the objection is noted, but overruled.

Any other challenges?

MS. BOOHER: No, your Honor.

THE COURT: Ms. Booher, do you wish to make any comment on your client's behalf?

MS. BOOHER: Your Honor, I do.

I would indicate to the Court that Mr. Creed stands before you with no prior adult problems. We do understand that he does have a prior juvenile record.

However, I would also indicate to the Court that he does have strong family support. As a matter of fact, three members from his family are here today to be with [11] him. His family has kept in close contact with me during this entire time. As a matter of fa I spoke to his mother yesterday. She could not come here because his immediate family actually resides out of state, and they could not – she could not come here to be here with him for his sentencing. However, she did indicate to me that anything that the Court would require of him, if he were given a jail sentence and placed on probation, anything that the Court asked of him, counseling, anything, treatment, that she would make sure that he got that.

I would also note to the Court that we received letters from his pastor, from an employer, and from the principal of the high school – and I have provided those to the Court this morning – in support of Mr. Creed. And we would ask

that you consider those letters when you are determining his sentence in this case.

As I indicated, Mr. Creed is not from this State. He happened to be here visiting when he committed this offense. And his family would strongly like for him to go back to his home state.

From the beginning of this case, your Honor, Mr. Creed has been extremely remorseful for what happened. From the time that I met with him the first time, he indicated to me how sorry he was that he was involved in this. And he indicated to me that nothing like this would [12] ever, ever occur again.

I don't believe that the prison recommendation is appropriate under the circumstances. He scores in a straddle cell. The Court has the right to give him a jail recommendation. That is what we are asking for.

He has served 188 days. We believe that based on the guidelines of 10 to 23 months, that the recommendation is, for a first felony offense, is disproportionate based on what occurred. As I indicated to the Court, before anything extremely serious – and I'm not saying that something serious did not occur – but before the actual – any kind of penetration occurred in this case, Mr. Creed got scared and ran. However, the assault had already been committed by that point. And I want to make sure that the Court also looks at that. He became scared, he ran. And, as I indicated, he, thinking back on it, has indicated to me how extremely remorseful he is for having done that in the first place, and that he is asking for a jail sentence, not a prison recommendation. The Court has the ability to do that based on the guidelines of the offense and due to the fact that it is a straddle cell at this point.

And the Court knows that I have challenged a lot of the scoring that is, in my opinion, kind of discretionary, psychological injury, things that we cannot truly pinpoint in regards to an offense. If those points [13] weren't there, I believe that he would score a jail recommendation and maybe a straddle cell with a smaller bottom line. When I had done the initial scoring in this case, I had scored him at, depending on the guideline – or some of the OVs, either at zero to 11 or 5 to 23, not the 10 to 23 as scored based on some of the OVs that I have objected to. Therefore, we would ask, your Honor, that he be given a twelve-month jail sentence.

THE COURT: The State's comments.

MS. MARVIN: Your Honor, I don't know how much more serious an offense could be, especially if you're a 15-year-old girl and all of sudden you're attacked in the woods and have a knife held to your throat.

It didn't go any further because this was a very brave 15-year-old girl. And, when she no longer felt the knife to her throat, she took it upon herself to scream. Fortunately, there were people close enough in the area that heard her.

The defendant's own statement, as contained in the pre-sentence, is: I was watching her at the lake and I watched her all day.

His previous history, the juvenile offense, involved the assault of a young female. My concern – or the People's concern, I should say, is the protection of society. I am concerned, also, that the local system does [14] not have the necessary programs to rehabilitate this defendant. We would ask that the Court follow the recommendation of the prison sentence where he can enter into the programs

so that hopefully when he is released, young females will no longer be in danger.

Thank you.

THE COURT: Mr. Creed, is there anything you would like to tell me?

THE DEFENDANT: Yes. I'm truly sorry for what I done on July 18th, 2003. I want to apologize to the family. I'm very sorry. And I truly, truly apologize to the girl, and I'm very sorry for what I did to her on July 18th, 2003.

That's all I have to say.

THE COURT: Counsel, will you mutually waive a detailed statement of matters covered by the report?

MS. MARVIN: Yes, your Honor.

MS. BOOHER: Yes, your Honor.

THE COURT: Mr. Creed is before the Court convicted by his own plea of a charge of assault with intent to commit criminal sexual penetration. It's a ten-year felony.

The circumstances of the offense have been, I think, substantially discussed during ruling on the challenges, so I'll not put any more detail on this record. [15] It certainly is a serious offense.

I am concerned that while the defendant has no other adult record, he has a juvenile offense of a similar nature. I'm not sure if a weapon was involved, but an assault on a younger girl.

The report notes positives in a limited fashion. The negatives focus on the prior offense, his educational limitations. He's in the 11th grade, not completed yet at age 19. Of course, the nature of the offense, which I've already covered, is a substantial negative.

The report contains other and more detailed information regarding the defendant, all of which has been read and considered.

I will note that I received today, and have attached to the report, th letters of support, three in number, for the defendant.

The guidelines, as scored, provide a range of from 10 to 23 months, as noted, a straddle cell.

I believe the probation department's recommendation is appropriate. To go higher, I would have to exceed the guidelines. And, while I probably could articulate sufficient grounds for doing so, I will not.

Mr. Creed, I'm going to commit you to the Michigan Department of Corrections for a period of 23 months to 10 years.

[16] You have credit for 188 days that you've already served.

I recommend to the Department of Corrections that while you're under their jurisdiction, you receive sexual offender counseling.

There is a crime victims rights fee of $60, I assume there's a state cost of $60 as well. It's not mentioned, but is assessed.

The report says bond is posted, but I see he's in jail oranges. Was there a bond posted and then –

MS. BOOHER: No, your Honor.

THE COURT: So there's no bond to apply.

That is your sentence.

It's my duty to inform you that you have the ability in this matter to go to the Court of Appeals and seek leave to appeal. To do this, you would most likely need the help of an attorney. If you can afford to hire your own attorney, you may do so. If you cannot afford to hire your own attorney, you can ask me to appoint one for you at public expense. If an attorney is appointed, he or she will be furnished with whatever portions of the record are necessary to perfect the appeal.

To request this court-appointed attorney, you must fill out and return to me, within 42 days, the forms I gave Ms. Booher and she is now handing to you.

* * *

STATE OF MICHIGAN)
) SS
SS COUNTY OF MECOSTA)

I, Thomas G. Lyons, Shorthand Reporter, do hereby certify that I reported in shorthand the proceedings had in the above-entitled matter before the Honorable Lawrence C. Root, Circuit Judge, at Reed City, Michigan, on January 21, 2004.

I further certify that the foregoing and attached pages constitute a true and full report of my shorthand notes then and there taken.

/s/ Thomas G. Lyons
Thomas G. Lyons,
CM, RPR, CSR 0287

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF OSCEOLA

PEOPLE OF THE STATE
OF MICHIGAN

-vs- File No: 03-3570-FC

JAMES RAY CREED,

Defendant. /

RE-ARRAIGNMENT

BEFORE THE HONORABLE
LAWRENCE C. ROOT, CIRCUIT JUDGE

Reed City, Michigan – Monday, November 10, 2003

APPEARANCES:

SANDRA D. MARVIN, Prosecuting Attorney
On behalf of the People
KIMBERLY L. BOOHER
On behalf of the Defendant

* * *

[3] THE COURT: The next matter is in the case of State versus James Ray Creed.

For the State?

MS. MARVIN: Thank you, your Honor. Sandra Marvin, Prosecuting Attorney for Osceola County.

THE COURT: For the defense?

MS. BOOHER: Thank you, your Honor. Kimberly L. Booher, attorney at law, Evart, Michigan.

THE COURT: This matter is before the Court today for re-arraignment.

MS. BOOHER: That is correct, your Honor.

Actually, this matter – for the record, this matter was actually set for a motion hearing regarding the – initially, regarding quashing the kidnapping charge.

There has been an agreement with myself and the prosecutor, though, in the meantime that in return for my client's plea of guilty to count two, the assault with intent to commit sexual penetration, that the prosecutor's office will dismiss the count one kidnapping charge.

MS. MARVIN: That is an accurate statement of the agreement, your Honor.

THE COURT: Ms. Booher, I assume you've previously received the Information?

MS. BOOHER: I have, your Honor, and we would waive its reading.

[4] THE COURT: Mr. Creed, before I can ask you any questions, you must be under oath. Raise your right hand to be sworn.

JAMES RAY CREED

being first duly sworn by the Clerk, was examined and testified as follow:

THE COURT: Mr. Creed, have you heard the statement of the terms of the plea agreement?

THE DEFENDANT: Pardon?

THE COURT: Did you hear what they said about the plea agreement?

MS. BOOHER: Did you hear what was said about you're going to plead guilty to one count and the other count is going to be dismissed?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. Do you understand the terms of that agreement?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are those terms acceptable to you?

MS. BOOHER: Is that okay with you?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is it a hearing problem?

MS. BOOHER: Yes, your Honor.

THE COURT: Okay. I'll try to speak loudly. If you can't hear, let me know, all right?

[5] THE DEFENDANT: Yes, your Honor.

THE COURT: Ms. Booher, how does your client plead?

MS. BOOHER: Your Honor, in regards to count two, he would plead guilty. In regards to count one, he would stand mute.

THE COURT: As to count one, the Court enters a plea of not guilty.

Mr. Creed, your attorney has indicated that you're going to plead guilty today to the charge of criminal sexual – excuse me – assault with intent to commit criminal sexual penetration. Does she make that statement with your approval?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is it your intention to plead guilty to that charge?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand the charge?

THE DEFENDANT: Yes, your Honor.

THE COURT: You should understand that if I accept your plea, you could face up to ten years in prison. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you ever been convicted of a felony before?

[6] THE DEFENDANT: No.

THE COURT: Are you now on probation or parole?

THE DEFENDANT: Probation, yes, your Honor.

THE COURT: Were you on that probation at the time you committed this offense?

MS. BOOHER: You're not on probation right now, are you?

THE DEFENDANT: Not now, no.

MS. BOOHER: No. He was not, your Honor.

THE COURT: You're not on probation?

THE DEFENDANT: No, your Honor. I'm sorry. I don't understand.

THE COURT: That's okay. If you have questions, don't be afraid to ask.

THE DEFENDANT: Yes, your Honor.

THE COURT: If I accept your plea of guilty, you will not have a trial, so the rights you normally would have at trial are being given up. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Also, by pleading guilty, you're giving up the right to appeal, although you would be able to go to the Court of Appeals and ask for leave to appeal. Do you understand the difference?

THE DEFENDANT: Yes, your Honor.

THE COURT: So you understand the rights you would [7] normally have at trial, but are giving up by pleading guilty, I'll go through a list of those with you now.

The first of those rights is the most basic, that's the right to the trial itself. You have the right to a trial by a jury of twelve people, or a trial by the Court, meaning a judge, with no jury involved. The choice between a jury trial and a judge trial is your choice, but to give up the jury, you need the approval of both the Judge and the prosecutor. Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: You have the right to be presumed innocent until proven guilty, you have the right to have the prosecutor be required to prove your guilt beyond a reasonable doubt. Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: You have the right to have the witnesses against you produced at trial, you have the right to have your attorney question or cross-examine those witnesses. Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: Also, you have the right to have any witnesses you want at the trial be ordered to be here. A court order would require them to be here to testify. Do you understand that?

THE DEFENDANT: Yes, your Honor.

[8] THE COURT: You have the right to testify at the trial if you want to. But, if you don't want to, you don't have to. And, if you choose not to testify, that would not be used against you. Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: Those are the rights you would have at trial. By pleading guilty, you're giving up those rights. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is that what you want to do?

THE DEFENDANT: Yes, your Honor.

THE COURT: If you've given a statement to the authorities regarding this offense prior to this time, you're entitled to a separate hearing, outside of the trial, to determine if you gave that statement voluntarily. If you did not give it voluntarily, it could not be used against you. Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: You should also understand that once I accept your plea of guilty, the only question remaining is sentencing. Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: Has anyone made any agreements with you, outside of the plea agreement, in exchange for your plea of guilty?

[9] THE DEFENDANT: I don't understand.

MS. BOOHER: Has anybody promised you anything or told you anything, that you would get anything or get sentenced to anything, besides the plea agreement in this case?

THE DEFENDANT: Oh. No, your Honor.

THE COURT: Outside of the plea agreement, has anyone promised you anything to influence you to plead guilty?

MS. BOOHER: Have you been promised anything besides the plea agreement?

THE DEFENDANT: No, your Honor.

THE COURT: Has anyone threatened you in any way to influence you,to plead guilty?

THE DEFENDANT: No, your Honor.

THE COURT: Do you understand that no one can make any promises as to what your sentence will be? Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Has anyone promised you anything regarding your sentence?

THE DEFENDANT: Yes, your Honor.

MS. BOOHER: Has anybody promised what your sentence will be?

THE DEFENDANT: No, your Honor.

[10] THE COURT: Do you understand you will not be sentence today?

THE DEFENDANT: Yes, your Honor.

THE COURT: Ms. Booher, are you aware of any promises, threats or inducements, other than as disclosed on this record, made to influence the defendant to plead guilty?

MS. BOOHER: No, your Honor. But hold on one moment.

(Off record conference between Ms. Marvin & Ms. Booher)

MS. BOOHER: Your Honor, I want to place one thing on the record. There have been no promises made. However, because of the fact that this was set for a motion, the prosecutor and I have discussed the fact that the –

that he would not be scored for the second felony charge being charged but dismissed.

When we're scoring his guidelines, I want to make sure that it's bought to the probation department's attention and placed on the record that it's not – there's not anything promised in regard to that, but there is an understanding that he won't get additional points for the second felony that was charged.

MS. MARVIN: That is true, your Honor.

THE COURT: Okay. I'll consider that part of the [11] agreement, and that will be noted. And, if the probation department has any issues, score it both ways, and I will deal with it at the time of sentencing in terms of which one to apply. I don't really know how it would come into play. But, if it turns out that they feel that from the department of corrections' guidelines they have to score it, they can score it, but I'm going to require that they also do a separate scoring pursuant to the plea agreement. The guidelines are what the guidelines are.

MS. BOOHER: Right. However, there are additional points if you have more than one felony charged. I believe it's subsequent or concurrent felony charges brought at the same time. And that's what our understanding is, that he won't get those points.

THE COURT: It may well be that's what the guidelines require. I don't know. If they think there's any argument, I'll have them do it both ways. He'll be sentenced under the guidelines consistent with the agreement, but I think the record has to have a set of guidelines that are accurate, whatever they – whatever that ends up being.

MS. BOOHER: Okay.

THE COURT: Is the State aware of any other promises, threats or inducements?

MS. MARVIN: No, your Honor.

[12] THE COURT: Mr. Creed, if I accept your pleas of guilty – your plea of guilty, you're going to be giving up any claim that you pled guilty because there were some other kinds of promises, threats or inducements. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: You should also understand that if I accept your plea of guilty, you're giving up any claim that the choice to enter this plea was not your choice. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you want a trial? Do you want to have a trial on this charge?

THE DEFENDANT: No, your Honor.

THE COURT: Is it your choice to plead guilty?

THE DEFENDANT: Yes, your Honor.

THE COURT: Before I can accept your plea of guilty, I must be satisfied that you are guilty, so I'm going to ask you a few more questions.

On or about July 18th of 2003, in Roselake Township of Osceola County, Michigan, did you have contact with a Kimberly Heether?

THE DEFENDANT: Yes.

THE COURT: Do you know who she is?

THE DEFENDANT: Yes.

[13] THE COURT: On that date, did you and she have contact? Did you see her that day?

THE DEFENDANT: Yes, your Honor, I saw her that day.

THE COURT: Okay. When you saw her, did you touch her?

THE DEFENDANT: Yes, your Honor.

THE COURT: Where did you touch her?

THE DEFENDANT: I just –

MS. BOOHER: Your Honor, he grabbed her –

THE DEFENDANT: I just grabbed her around –

MS. BOOHER: – around the neck, I believe, your Honor, and he pulled a weapon.

THE COURT: Is that true?

THE DEFENDANT: Yes, your Honor.

THE COURT: Was your purpose in doing that to have sexual intercourse with her?

THE DEFENDANT: Yes, your Honor.

THE COURT: Were you going to try to force her to do this?

THE DEFENDANT: Yes, your Honor.

THE COURT: I believe that testimony satisfies the elements of the count two charge.

Do you believe the Court has complied with MCR 6302, Ms. Marvin?

[14] MS. MARVIN: Yes, your Honor.

THE COURT: Ms. Booher?

MS. BOOHER: Yes, your Honor.

THE COURT: Mr. Creed, in the last 24 hours, have you consumed any type of intoxicants, either alcohol, narcotics, medication, or any other type of controlled substance?

THE DEFENDANT: What do you mean?

MS. BOOHER: Have you taken any medicine in the last 24 hours?

THE DEFENDANT: No, your Honor.

THE COURT: I believe the defendant is competent. The problems I think we're running into is a matter of hearing more than anything else. At least that's my understanding.

MS. BOOHER: That is correct.

THE COURT: Does the State concur?

MS. MARVIN: Yes, your Honor.

THE COURT: The Court accepts the defendant's plea to the count two charge.

The question of sentencing is referred to the probation department for investigation and report. Upon receipt of that report, the matter will be scheduled for sentencing.

Bond is continued.

[15] Ms. Booher, I've been handed the standard DNA order. Is there any objection?

MS. BOOHER: No, your Honor.

THE COURT: It is being signed.

STATE OF MICHIGAN)
) SS
COUNTY OF MECOSTA)

I, Thomas G. Lyons, Shorthand Reporter, do hereby certify that I reported in shorthand the proceedings had in the above-entitled matter before the Honorable Lawrence C. Root, Circuit Judge, at Reed City, Michigan, on November 10, 2003.

I further certify that the foregoing and attached pages constitute a true and full report of my shorthand notes then and there taken.

/s/ Thomas G. Lyons
Thomas G. Lyons, CM,
RPR, CSR 0287

SENTENCING INFORMATION REPORT

(Filed Jan. 28, 2004)

Offender: Creed, James Ray **SSN:** 430-57-3706

Workload: 3452 **Docket Number:** 033570-FH

Judge: The Honorable Lawrence C Root **Bar No.:** P25474

Circuit No.: 49 **County:** 67

Conviction Information

Conviction PACC: 750.520G1

Offense Title: CSC Asslt w/Intent Commit Sex Penetration

Crime Group: Person **Offense Date:** 07/18/2003

Crime Class: Class D **Conviction Count:** 2 of 2

Scored as of: 07/18/2003 **Statutory Max:** 120

Habitual: No **Attempted:** No

Prior Record Variable Score

PRV1: 0 **PRV2:** 0 **PRV3:** 0 **PRV4:** 0 **PRV5:** 2

PRV6: 0 **PRV7:** 0

Total PRV: 2

PRV Level: B

Offense Variable

OV1: 10 **OV2:** 5 **OV3:** 0 **OV4:** 10 **OV5:** 0
OV6: 0 **OV7:** 0 **OV8:** 15 **OV9:** 10 **OV10:** 15
OV11: 0 **OV12:** 0 **OV13:** 0 **OV14:** 0 **OV16:** 0
OV17: 0 **OV18:** 0 **OV19:** 0 **OV20:** 0

Total OV: 65
OV Level V

Sentencing Guideline Range

Guideline Minimum Range: 10 to 23

Minimum Sentence

	Months	Life
Probation:		☐
Jail:		
Prison:	23	☐

Sentence Date: 1/21/04 ~~12/22/2003~~

Guideline Departure: No

Consecutive Sentence:

Concurrent Sentence: ~~Yes~~

Sentencing Judge: /s/ Lawrence C. Root **Date:** 1/26/06

Prepared By: YOUNG, NANCY A

Order
August 30, 2005

Michigan Supreme Court
Lansing, Michigan

Clifford W. Taylor
Chief Justice

128239

Michael F. Cavanaugh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES RAY CREED,

Defendant-Appellant. /

SC: 128239
COA: 260235
Osceola CC: 03-003570-FC

On order of the Court, the application for leave to appeal the February 23, 2005 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 30, 2005

/s/ Corbin R. Davis
Clerk